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hearing at 6 Nov 07
30 Oct 07
✍*

IN THE FIFTH DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**DEFENDANT'S MEMORANDUM
IN SUPPORT OF MOTION *IN LIMINE*
AS TO RECORDED
JAIL CONVERSATIONS**

[FILED UNDER SEAL]

Case No. 061500526

Judge James L. Shumate

Defendant, Warren Steed Jeffs, respectfully submits the following Memorandum in support of his Motion *In Limine* pertaining to certain conversations between the Defendant and his family and friends recorded by jail officials.

ARGUMENT

I. DESCRIPTION AND CONTEXT OF THE PROPOSED 404(B) EVIDENCE

In response to the Defendant's Motion for Notice of Potential Rule 404(b) Evidence, the State responded that it intended to introduce, *intra alia*,¹ the following: "Video and audio recordings of statements of the Defendant made while at the Purgatory Correctional Facility to the effect that the Defendant is not the prophet and has not held the priesthood because of immoral actions with a sister and a daughter." To properly analyze the evidentiary problems posed by the offer of these statements, the Court will need to consider the context in which the statements were made.

The Defendant has been detained in the Purgatory Correctional Facility since September 2006. As this Court is aware, the Defendant began experiencing serious medical problems towards the end of January 2007. On January 28, 2007, medical staff at the jail determined that the Defendant required emergency medical treatment and rushed him to the hospital. Following his release from the hospital, the Defendant continued to suffer medical difficulties. Although the State did not identify the dates on which the recorded conversations occurred, it appears that the State will focus on the *time frame* when the Defendant's health was seriously impaired.²

¹ The State also provided notice of other proposed 404(b) material, but has not yet furnished the Defendant with discovery pertaining to the other matters. Accordingly, the Defendant reserves his right to move for exclusion of other potential 404(b) evidence upon receipt and review of supplemental discovery.

² The Court has previously ordered the parties to serve copies of sealed motions upon the attorneys for the media interveners. To protect the Defendant's right to fair trial and privacy, the Defendant requests that the Court close a portion of the hearing on the merits of this motion, pursuant to Society of Professional Journalists v. Bullock, 743 P.2d 1166, 1178 (Utah 1987). In defining the procedures for closure of a proceeding, the Bullock Court stated that a court may close a portion of a hearing on the matter to the extent necessary to protect countervailing interests. Id. The Defendant requests that this Court close a limited portion of the hearing on

On January 24, 2007, the Defendant made a series of phone calls to family and church members in which he related that when he was 20 years old, he had been immoral with a sister and a daughter. He renounced his role as the Prophet, explaining that the Lord revealed to him that he was a wicked man and has not held the priesthood since he was 20 years old. Some of the persons to whom he spoke responded that he was the Prophet and was merely "being tested." The Defendant, currently age 51, did not elaborate upon the immoral conduct which occurred 31 years ago.

On January 25, 2007, the Defendant met with his brother in a video-taped visitation in which he explained that he had been fasting for three days and was awake all night. At one point in the visit, the Defendant began to dictate a religious message of encouragement to members of his religious community, but he suddenly halted in mid-sentence and remained silent for over 13 minutes. His brother attempted to engage him in further conversation, including the need to arrange for him to be examined by doctors. Nonetheless, the Defendant remained non-communicative for extended periods of time. Towards the end of the visit, the Defendant renounced his role as the Prophet.

In February 2007, the Defendant's health improved compared to his drastic condition at the end of January. In recorded telephone conversations in February 2007, the Defendant retracted his renouncement of the prophecy and explained that he had experienced a great spiritual test. Through much of February, the Defendant conversed with family and church members and encouraged their faith. In March 2007, however, the Defendant again experienced medical problems. This Court granted defense

the merits of this motion so that the Defendant may more fully discuss the Defendant's medical condition at the time of the recorded jailhouse statements.

counsel's motion for a competency hearing. In mid-April 2007, evaluating physicians determined that he was competent to stand trial despite suffering from a depressive disorder.

II. PROPOSED EVIDENCE INADMISSIBLE AS CHARACTER EVIDENCE, IRRELEVANT AND SUBSTANTIALLY PREJUDICIAL

The proposed evidence meets none of the criteria for admissibility under Rule 404(b). The Defendant's jailhouse statements appear to be offered for an impermissible character purpose irrelevant to the instant charge. Moreover, the unfairly prejudicial effect of the evidence far outweighs whatever little probative value it may have.

Under Rule 404(b), evidence of prior bad acts is inadmissible to prove the Defendant's character and a propensity to act in conformity therewith. To introduce evidence of prior bad acts, the proponent must show a permissible non-character purpose and establish that the evidence meets the relevancy requirements of Rule 402 and avoids unfair prejudice pursuant to Rule 403. *State v. Fedorowicz*, 52 P.3d 1194, 1202-04 (Utah 2002); *State v. Allen*, 108 P.3d 730, 734-36 (UT App. 2005).

In determining whether prior bad act evidence unfairly prejudices the Defendant, a court must consider a number of factors, including (1) the strength of the evidence of the prior bad act; (2) the similarity of the prior act to the charged offense; (3) the remoteness in time between the prior act and charged offense; (4) the necessity for the proffered evidence; (5) the likelihood that the prior bad act evidence will confuse the issues or mislead the jury; (6) the degree to which the evidence will invoke an emotional and hostile response by the jurors; and (7) whether the presentation of the evidence will cause undue delay or waste of time. *Allen*, 108 P.3d at 736.

In its notice of Rule 404(b) notice, the State did not indicate any non-character

purpose for the Defendant's statements. Inasmuch as the recorded statements make vague reference to conduct which may have occurred 31 years ago, the apparent purpose is to depict the Defendant as a wicked and immoral man who acted in conformity with this bad character when committing the alleged offenses. The recorded statements are irrelevant to instant charges which allege that the Defendant was an accomplice to sexual assault in the time frame of April 2001 to September 2003.

In addition to the impermissible character purpose and irrelevancy, the unfair prejudicial effect of the recorded statements substantially outweighs whatever morsel of probative value they may have. As already noted, the statements concern a vague reference to immoral behavior occurring 31 years ago. Moreover, the Defendant's vague and ambiguous reference to undefined immoral conduct bears little, if any, similarity to the Defendant's alleged role as an accomplice to rape in the instant case. The Defendant's seeming admission to the recollection of an unspecified immoral act (over a quarter century ago) in the context of a spiritual, religious conversation cannot even be categorized as a prior bad act. Immoral conduct may or may not be a legally bad act within the meaning of Rule 404(b). As such, the evidence of the possible prior bad act is extremely weak and indefinite. Through introduction of the proposed evidence, the State would invite the jurors to engage in pure speculation to discern its probative value.

What is the probative value of the Defendant's recent religious turmoil and questioning of his role in the FLDS church? The answer is not readily discernable. What is certain is that the presentation of such evidence would needlessly consume hours, if not days, of testimony as the circumstances surrounding the making of the

statements would need to be presented to the jury. Without putting the Defendant's statements in context, the jury would be misled. To accurately explain the circumstances surrounding the statements, evidence would have to be presented concerning the health problems experienced by the Defendant while held in isolated detention. It would also require evidence regarding the FLDS religious concept of a "test of faith" and the intricacies of the belief in divine revelations. The jurors attention would be diverted from the offenses charged as they consider the Defendant's mental state and religious beliefs. Furthermore, a strong likelihood exists that the jailhouse recordings would also inflame the jurors' emotions and hostilities against the Defendant as they listen to and view the tapes of his religious struggles and beliefs.

The jailhouse recordings of the Defendant's admissions of vague and remote immorality, as well as his recent spiritual turmoil over his role in the FLDS Church, should be excluded as irrelevant and unfairly prejudicial.

DATED this _____ day of July, 2007.

BUGDEN & ISAACSON, L.L.C.

By: _____
WALTER F. BUGDEN, JR.
TARA L. ISAACSON

WRIGHT, JUDD & WINCKLER
RICHARD A. WRIGHT

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CERTIFICATE OF SERVICE

I hereby certify that, on the ____ day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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